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85-943

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1985

SIDNEY MALLET,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether cash payments to a union official expressly designated for distribution to striking union workers of a competitor corporation, no portion of which was to be retained or in fact was retained by the union official for his own or union purposes, is a violation of the Labor Management Relations Act, 29 U.S.C. § 186 (a)(4).

2. If a violation and malum prohibitum, does the statute violate petitioner's First Amendment rights?

STATEMENT PURSUANT TO RULE 21(b)

In addition to the parties listed in the caption of the case in this Court the party before the United States Court of Appeals for the Third Circuit in a separate appeal based upon the same fact situation was Burton Bloom, the union official.

The within petition is filed on behalf of Sidney Mallet, an individual.

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No._____

In The
SUPREME COURT OF THE UNITED STATES

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SIDNEY MALLET,

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vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Sidney Mallet, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been officially reported, is set forth below at A-1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 23, 1985. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTE

Labor Management Relations Act, 29 U.S.C. § 186 (a)(4):

> (a) It is unlawful for any employer ... to pay, lend or deliver or agree to pay, lend or deliver any money or other thing of value
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with the intent to influence him in respect of any of his actions, decisions or duties as a representative of employees or as such officer or employee of such labor organization.

STATEMENT OF THE CASE

Petitioner, Sidney Mallet, paid money to the president of a local union to which none of his employees were members. Money had previously been paid directly to strikers of a competitor of petitioner and in response to the request of the president of the local petitioner made payments for the strikers through the president of the local so that all strikers would be treated equally. The president of the union represented that payments to the strikers directly was unfair since only those on the picket line at the time money was delivered received the funds. The money was deposited in the union treasury and all of the funds were distributed directly to the strikers and were not intended to be

used by the president of the local union personally or for any other union business. No funds were used by the president of the local union personally or for any other union business. The president of the union was indicted and went to trial and was convicted by a jury. Subsequently the petitioner was indicted and by reason of the charge of the court as to the president of the union that the Labor Management Relations Act was malum prohibitum and that it was not material that the employer who supplied the money was not an employer of the strikers or that the money was paid to a representative who did not represent the payor's employees, petitioner entered a conditional plea of nolo contendere which was accepted by the court under F.R.C.P.

11(a)(2). Petitioner was sentenced to pay a fine of $7500.00 and one year probation. An appeal was taken to the United States Court of Appeals for the Third Circuit which, on October 23, 1985, affirmed the lower court. As part of the decision affirming, the court of appeals denied the argument of petitioner that a broad application of 29 U.S.C. § 186-(a)(4) would violate his First Amendment rights under the United States Constitution.

REASONS FOR GRANTING THE WRIT

This case presents a substantial question regarding the payment of funds by a nonemployer to strikers of a competitor.

The court below in its charge to the jury in the case of the president of the union charged that:

> "It is not material here that the employer who supplied the monies is another employer. It doesn't have to be the employer of the striker himself. It can be applied to anyone who is an employer in the industry to give money to any union official to do anything with it. So, there need be no showing of an intent or purpose to violate the law."

It was further stipulated in the trial court that none of the funds were kept by the union president; that the union on strike was financially in trouble; that petitioner's employees as well as petitioner had previously given funds directly to those on the picket line and that the $4,000.00 ultimately given in four payments to the president of the union was at his request and promise that the money would get to the men on the picket line fairly and equally.

Subparagraph (4) of the Act requires an intent to influence the representative in respect to any of his actions. United States v. McCarthy, 422 F.2d 160 (2d Cir. 1970); United States v. Ferrara, 485 F.2d 868 (2d Cir. 1972).

This Court has characterized § 186 as "a criminal provision . . . which outlaws all payments, with stated exceptions, between employer and representatives." United States v. Ryan, 350 U.S. 299 at 305 (1956). However, the purpose of the Act was to prevent employer representatives and union officials from betraying the employees' interests and to assure that employer representatives would not profit from their positions of trust. United States v. Lanni, 466 F.2d 1102 at 1104 (3rd Cir. 1972).

As interpreted by the courts below if petitioner employed non-union workers he would still be an employer under the definition of § 186(a)(4) and payments to strikers through union officials would be a criminal act. In Ventimiglia v. United States, 242 F.2d 620 (4th Cir. 1957), it was held that a union agent was not a representative of non-union employees of a non-union contractor.

If the Act is applied as the courts below have applied it, then it is a violation of the petitioner's First Amendment rights to free speech and to peaceably assemble.

Under the stipulation of facts under the conditional plea paragraph 13 states:

> Sidney Mallet had been advised by Burton Bloom that said deliveries of

> monies to the picket line were causing problems inasmuch as the monies were not being equally distributed among all strikers. Thereafter, Bloom requested that Mallet have the funds delivered to Bloom so that Bloom could ensure that the monies would be fairly and equitably distributed to all strikers.

Further, stipulation of fact 16 states:

> The funds given by Mallet to Bloom were deposited in the treasury of Local 538 and were distributed to those who were on strike.

The history of the National Labor Relations Act and the Taft-Hartley Act relates the need to insure workers of the economic strength to achieve a decent living wage and working conditions. For example, 29 U.S.C. § 151 sets forth the congressional findings and policy leading to the passage of the Act. Among the need for the legislation is the declared finding of Congress that:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

The employees of Bakerstown, members of Local 538, were paid wages substantially lower than employees working for petitioner.

Under the stipulation of facts, No. 18, the government agreed:

> Mallet's contract with the local Teamsters union did, in fact, require him to pay a considerably higher wage and benefit package to his employees than Bakerstown paid to its employees.

This was in part due to the poor financial condition of Local 538 which could not finance a strike against Bakerstown.

There is nothing in the law nor in the Constitution which prohibits a citizen from acting in his own self-interest as long as his action is not prohibited specifically by a valid and constitutional statute. As interpreted by the court below, if a local television station -- an employer -- conducted a campaign to raise donations of food and money for strikers employed by a coal mine and if the food and money were given to the president of the local for distribution to the strikers and their families, the television station would be guilty of a violation of the Act for

influencing a union official in the performance of his duties. The money given by petitioner to the strikers was not to influence the union official in the performance of his duties. The fact that the union official wanted the funds equally distributed to strikers and asked that the funds be directed through him was not the payment of funds to the union official to influence the performance of his duties but rather to give the strikers economic parity and clout to get a better contract, which is the intent of the labor statutes and regulations in this country.

As construed by the court below the statute is a violation of petitioner's First Amendment rights. This Court has reaffirmed the broad application of the

First Amendment in Federal Election Commission v. National Conservative Political Action Committee, et al., 105 S.Ct. 1459 (1985). This decision was the progeny of Buckley v. Valeo, 424 U.S. 1 (1976), in which the Court, at pages 40-41, held:

> "A close examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests."

Expanding on the Buckley decision this Court in Federal Election Commission held:

> But for purposes of presenting political views in connection with a nationwide Presidential election allowing the presentation of views while forbidding the expenditure of more than $1,000.00 to present them is much like allowing a speaker in a

> public hall to express his views while denying him the use of an amplifying system.

The impact of the Federal Election Commission and Buckley cases was to protect mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to amplify the voice of their adherence. The court of appeals in distinguishing the Federal Election Commission case held:

> Preventing corruption is a compelling governmental interest underlying the LMRDA. The statute "is designed to prevent, discourage, and make unprofitable improper conduct on the part of officials, employers, and their representatives."

In the instant case there was no improper conduct on the part of officials, employers, or their representatives unless the

payment of money to the strikers to assist them in their fight against an employer is somehow proscribed by the Act. Nowhere has the government argued that petitioner could not give money directly to the strikers. That it was channeled through a union official not of the payor's company nor a representative of his employees cannot be illegal conduct if close examination of the specificity of the statutory limitation is made as mandated by Buckley.

No case has been cited where the union official did not benefit economically from the receipt of funds. It is respectfully submitted that there is no case in which an employer has been found guilty of an offense where at least some of the funds did not stick to the fingers

of the union representative or his paramour. For example, in United States v. Lanni, supra, the union official used his influence to get local businesses to use the trucking services of the employer who employed his union members and which employer paid $16,300.00 to his girl friend.

CONCLUSION

A writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit since said judgment for the first time expands § 186(a)(4) of the Labor Management Relations Act to make criminal the payment of funds by a non-employer to a

union representative who is to and in fact did pass all of the money through to his member strikers.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-3093 and 85-3102

UNITED STATES OF AMERICA
vs.
MALLET, SIDNEY,
Appellant, No. 85-3093
(W.D. Pa. Crim. No. 85-00001)

UNITED STATES OF AMERICA
vs.
BLOOM, BURTON
Appellant, No. 84-00229)

Appeal from the United States District Court
for the Western District of Pennsylvania

Argued October 2, 1985
Before: HUNTER and WEIS, Circuit Judges,
and DUMBAULD,* Senior District Judge

(Filed Oct 23, 1985)

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* The Honorable Edward Dumbauld, United States Senior District Judge, Western District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

These appeals arising from a criminal conviction and a conditional plea of nolo contendere require us to decide whether the district court correctly determined that the Labor-Management Reporting and Disclosure Act proscribed the defendants' conduct at issue here. Concluding that the district court did not err, we will affirm.

I.

Defendant Burton Bloom served as president of Local Union 538, International Brotherhood of Teamsters. Local 538 represented a majority of the employees of Bakerstown Container Corporation, a business engaged primarily in the reconditioning of steel drums. In November 1979, contract negotiations between Bakerstown Corporation and the

Local broke down, and a strike began that lasted until March 7, 1980.

During the strike, defendant Sidney Mallet was president of Malitovsky Cooperage Company, a competitor of Bakerstown Corporation. Neither he nor any of the Malitovsky's employees were associated with Local 538. During January and February 1980, Mallet gave Bloom $4,000 which was distributed to the striking employees of Bakerstown. Bloom made the payments to the strikers openly through the union's bank accounts and did not profit personally.

Bloom was convicted of willfully and knowingly agreeing to receive, and accepting, from an employer money given with the intention of influencing his

actions as an officer of a labor organization, in violation of 29 U.S.C. § 186(b)(1). Following Bloom's conviction, Mallet entered a conditional plea of nolo contendere pursuant to Rule 11(a)(2) Federal Rules of Criminal Procedure to four counts of willfully and knowingly paying money to an officer of a labor organization with the intention of influencing his actions, in violation of 29 U.S.C. § 186(a)(4).

II.

On appeal, both defendants contend that the district court misconstrued the scope of 29 U.S.C. § 186(a)(4). In addition, Mallet argues that application of this statute to proscribe his conduct violates his rights protected by the first amendment to the United States

Constitution. These contentions implicate the interpretation and application of legal precepts, therefore, our review is plenary. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 102 (3d Cir. 1981).

III.

Section 186 of the Labor Management Relations Act reads:

> "(a) It shall be unlawful for any employer . . . to pay . . . any money . . .
>
> "(1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> "(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

. . .

"(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

29 U.S.C. § 186.

The interpretation of § 186(a)(4) is critical to both defendants because

Mallet's alleged violation of that subjection is the predicate for Bloom's liability under § 186 (b)(1). Defendants assert that § 186(a)(4) requires a direct employment relationship such that an employer does not violate the statute unless the person to whom he makes payments is an officer or employee of a union representing that employer's workforce. Thus, defendants argue that because the striking Local 538 members were not associated in any way with Mallet or the Malitovsky Cooperage Company, no criminal activity occurred. This argument is unpersuasive for several reasons.

The plain wording of § 186 cannot be disregarded. We must assume that the

legislative purpose is expressed by the ordinary meaning of the words used. Absent a clearly expressed legislative intent to the contrary, the statutory language generally is conclusive. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).

A comparison of the wording of § 186 (a)(4) with that of other provisions in § 186 demonstrates that Congress used different and specific language when referring to a direct employment relationship between an employer and members of a union. Subsection (1) prohibits payments from "any employer" to "any representative of any of his employees." Subsection (2) proscribes payments by an employer "to any labor organization

. . . which represents . . . any of the employees of such employer." Subsection (3) prohibits contributions from an employer "to any employee . . . of such employer" for specified unlawful purposes.

The language of § 186(a)(4) does not include these specific limitations. That section proscribes payments by "any employer" to "any officer or employee of a labor organization." Thus, like its predecessor § 302(b) of the LMRA, § 186 (a)(4) is a criminal provision, malum prohibitum, which outlaws all payments by any employer to any union representative. See United States v. Ryan, 350 U.S. 299, 305 (1956). Finding no reason to question the ordinary meaning of the language

used by Congress, we conclude that § 186(a)(4) clearly encompasses the payments by Mallet, an employer, to Bloom, an officer of a union.

Moreover, the legislative history supports the district court's interpretation of § 186 (a)(4). The views set forth in the Senate Report reflect an understanding that § 186(a)(4) would apply in the circumstances present here. Some members of Congress wanted to extend the criminal prohibitions of § 186(a)(4) to include "any person" rather than "any employer." The minority report states:

> "[W]hy should such [payment] be criminal only if . . . [made] by an employer, even if the employer and the subverted official's union have absolutely no relations with each other? (The bill's language includes such a

> situation in its scope). If the subversion of union officials is reprehensible and merits outlawing, why shouldn't it be outlawed regardless of who does the subverting? As the bill now reads, a Jimmy Hoffa or Dave Beck can subvert the president of the Retail Clerks Union by paying him to give up an organizing campaign so that the Teamsters can take it over, and no crime is committed. But if an employer in the steel industry gives something of value to his acquaintance, the head of a textile workers union, to persuade him to influence his union to change its political line, that would be a crime under the bill. A minority amendment to make it a crime for <u>any person</u> (not merely an employer) to subvert a union official was rejected."

S. Rep. No. 187, 86th Cong., 1st Sess. 2, <u>reprinted in</u> 1959 U.S. Code Cong. & Ad. News 2318, 2402-03. Hence, the plain language of the statute coupled with the legislative history demonstrates that

Mallet, as president of Malitovsky Cooperage Company, violated § 186(a)(4) by making cash payments to Bloom, a union officer, for distribution to striking union workers of a competitor corporation.

The facts here show that Mallet did more than merely spend his own money to express, by his own direct action, his support for a cause dear to his heart. He did not himself distribute the money to the strikers at his competitor's plant. He paid money to Bloom, an officer of a labor organization, with intent to influence him in respect to Bloom's actions, decisions or duties as such officer of a union: namely to encourage Blook to distribute the money

to strikers in accordance with what Bloom thought would be a fairer mode of distribution and which would be most advantageous in furthering the effectiveness of the strike being conducted under Bloom's direction. Mallet intended by his payment to influence Bloom's actions as a union officer by enabling Bloom, aided and abetted by Mallet's financial support, to carry out Bloom's plan of helping to accomplish the aims of the union by distributing the money in the most effective manner in order to achieve the union's objectives.

IV.

Relying on Federal Election Commission v. National Conservative Political Action Committee, 53 U.S.L.W.

4293 (March 18, 1985), Mallet asserts that application of § 186(a)(4) abridges his first amendment rights. In Federal Election Commission, the Court invalidated a provision of the Presidential Election Campaign Fund Act, 26 U.S.C. § 9012(f), that made it a criminal offense for a political committee to support financially a Presidential or Vice Presidential candidate who accepts public financing. The Court rested its decision on the analytical framework established in Buckley v. Valeo, 424 U.S. 1 (1976):

> "We held in Buckley . . . that preventing corruption or the appearance of corrpution are the only legitimate and compelling government interests thus far identified for restricting campaign finances. In Buckley we struck down the FECA's limitation on individuals' independent expenditures because we found no

tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption. For similar reasons, we also find § 9012(f)'s limitation on independent expenditures by political committees to be constitutionally infirm.

"Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate."

53 U.S.L.W. at 4298.

Mallet's reliance on Federal Election Commission is misplaced. Preventing corruption is a compelling governmental interest underlying the LMRDA. The statute "is designed to

prevent, discourage, and make unprofitable improper conduct on the part of officials, employers, and their representatives." S. Rep. No. 187, 86th Cong., 1st Sess. 2, reprinted in 1959 U.S. Code Cong. & Ad. News 2318, 2321.

Unlike the provision struck down in Federal Election Commission, Congress engrafted a financial quid pro quo as an element of a § 186(a)(4) offense -- an employer may not make payments to a union official for the purpose of influencing him in his union capacity. This element, along with the statute's prohibitions against direct payments to union officers or employees, effectively insulates § 186(a) from the first amendment problem raised in Federal Election Commission.

Mallet further asserts that "There is nothing in the law nor in the Constitution which prohibits a citizen from acting in his own self interest as long as his action is not prohibited specifically by a constitutional statute." But here there is such legislation.

We therefore hold that the defendants' actions were specifically prohibited by §§ 186(a)(4) and (b)(1), and that application of those sections to the case at hand does not violate the first amendment. Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:
Please file the foregoing opinion.